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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES MICHAEL MACPHEE, Plaintiff and Appellant, v. LUIS A. CHANES et al., Defendants and Respondents.	G056481 (Super. Ct. No. 30-2017-00909772) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila Fell, Judge. Affirmed.

James Michael MacPhee, in pro. per., for Plaintiff and Appellant.

Schmid & Voiles, Denise H. Greer, Sidney J. Martin and Michael C. Ting for Defendants and Respondents.

* * *

James Michael MacPhee appeals from the judgment entered in this medical negligence case, following the trial court's grant of a summary judgment in favor of defendants Luis A. Chanes, M.D. and Eye Associates of Orange County dba Luis Chanes, M.D., Inc. (Chanes). MacPhee alleged Chanes negligently selected the intraocular lens (IOL) that he implanted in MacPhee's left eye during cataract surgery and that Chanes negligently performed the surgery in such a way as to cause him to suffer from post-operative diplopia (double-vision). The court granted summary judgment in favor of Chanes on the basis there was no triable issue of disputed fact on the question of whether he had complied with the standard of care in his treatment of MacPhee.

MacPhee contends the court's summary judgment ruling must be reversed because (1) the court erred by overruling his objection to Chanes's expert witness declaration on the ground that Chanes failed to comply with MacPhee's demand for exchange of expert witness information; (2) the court erred by overruling his objection that Chanes's expert's opinion was based on hearsay; (3) Chanes's expert's opinion failed to separately address MacPhee's assertion that surgical error had caused him to suffer from double vision (diplopia), and thus it did not dispose of all theories of liability; and (4) other evidence created triable issues of fact which undermined the conclusions of Chanes's expert.

We reject MacPhee's contentions and affirm the judgment. The court was not required to exclude Chanes's expert declaration from evidence unless it concluded Chanes had *unreasonably* failed to comply with his obligations in connection with expert witness disclosure. We find no error in its presumptive determination that Chanes had not acted unreasonably. MacPhee's hearsay objection to the expert's declaration fails to account generally for the fact that the medical records relied upon by the expert witness in forming his opinion were admitted into evidence; and the only specific fact MacPhee points to as hearsay inappropriately adopted by the expert was not germane to the expert's opinion regarding the standard of care.

Although MacPhee had only one theory of liability—medical negligence—he did assert that his treatment by Chanes had been negligent in two different ways. Chanes's expert addressed both contentions in concluding that Chanes had complied with the applicable standard of care.

Finally, the other evidence MacPhee points to is not sufficient to create a triable issue of fact on the question of whether Chanes's treatment of him breached the applicable standard of care. MacPhee offered no expert witness of his own to rebut the opinion of Chanes's expert, and MacPhee's own analysis of the evidence proves only that the outcome of his cataract surgery was poor. Poor outcomes do not automatically give rise to an inference of medical negligence.

FACTS

In March 2017, MacPhee filed a form complaint alleging Chanes committed medical negligence in connection with performing cataract surgery on MacPhee's left eye. His description of the facts giving rise to the cause of action was brief: "The legal basis of the claim is negligence committed during the patient care provided by . . . Chanes before, during and after the cataract surgery performed on the left eye . . . .[¶] . . . [¶] [t]he specific nature of the injuries suffered is damage to the cornea as a result of the cataract surgery which caused double vision (Diplopia), Irregular astigmatism, Anisometropia and Aniseikonia. Further injury is the insertion of a lens which impairs the visual acuity of [MacPhee's] left eye."

In June 2017, the trial court ordered the case be classified as a limited jurisdiction case—a designation MacPhee challenged by filing a petition for writ of mandate in this court. In response to that petition, we issued an alternative writ on September 13, 2017, ordering the court to either vacate its ruling and hold a hearing on the issue, or to show cause why a peremptory writ should not issue.

Two weeks after the alternative writ issued, the trial court held a case management conference and set the matter for trial in April 2018, apparently as a limited jurisdiction case.

In October 2017, Chanes filed a motion for summary judgment, arguing the undisputed facts demonstrated both that his treatment of MacPhee had complied with the applicable standard of care, and that his treatment had not caused the vision issues MacPhee was complaining of. Chanes supported those contentions with the declaration of an expert witness.

Chanes's expert, a board certified ophthalmologist, reviewed the records relating to MacPhee's surgery and opined that Chanes had conducted appropriate preoperative testing and that he "selected the appropriate lens power based on the preoperative calculations and evaluation." The expert also pointed out the records reflected Chanes had advised MacPhee before the surgery of the risk of vision disparity and diplopia, and had also advised him that there were lens "measurement issues" due to MacPhee's history of corneal scarring and prior eye surgery.

The expert opined that based on the medical evidence, Chanes "performed the left eye cataract surgery within the standard of care." He acknowledged MacPhee "had a subconjunctival hemorrhage following the surgery," but explained "this is a known complication of the surgery and is considered benign."

The expert opined that MacPhee's post-operative vision complaints were not caused by the cataract surgery, but were instead attributable to the combination of MacPhee's preexisting conditions of keratoconus, corneal scarring and astigmatism, and the post-operative visual disparity between his left eye, without a cataract, and his right eye, which remained impaired by an "advancing cataract that requires surgery." The expert concluded that "[c]ataract surgery in the right eye with a lens implant that balances with the refraction in the left eye should resolve the issue . . . ."

On November 30, 2017, the trial court held the hearing required by our alternative writ and ordered the case reclassified as an unlimited jurisdiction case. The case was reassigned for all purposes to a new judge, who set the case for trial on January 7, 2019, and scheduled a series of pre-trial dates and requirements in connection with that trial date.

On December 5, 2017, Chanes gave notice that the court had set the hearing on his motion for summary judgment for February 27, 2018. MacPhee filed opposition to the summary judgment motion in a timely fashion. MacPhee's opposition argued that Chanes's motion had not satisfied his initial burden in seeking summary judgment because he failed to address MacPhee's claim that the surgery had caused him to suffer double vision. Although MacPhee offered various objections to the evidence relied upon by Chanes, he did not provide an expert declaration to counter Chanes's claim that his treatment of MacPhee had met the standard of care.

Meanwhile, on January 26, 2018, MacPhee served Chanes with a demand for exchange of expert witness information, setting the date of the exchange for February 21—six days before the summary judgment hearing. On February 21, MacPhee served his expert witness information on Chanes, stating he did not presently intend to offer the testimony of any expert witness at trial.

Chanes did not comply with the demand for exchange of expert witness information; thus, MacPhee filed a "supplement" to his summary judgment evidentiary objections on February 22. MacPhee argued that Chanes's failure to comply with the expert witness demand rendered his expert's opinion inadmissible in connection with summary judgment pursuant to Code of Civil Procedure section 2034.300[1] and *Perry v. Bakewell Hawthorne LLC* (2017) 2 Cal.5th 536,.

[1] All further statutory references are to this code unless otherwise indicated.

The court granted Chanes's motion for summary judgment on February 28, 2018, explaining the expert declaration submitted by Chanes was sufficient to demonstrate Chanes complied with the applicable standard of care in his treatment of MacPhee. Thus, the burden shifted to MacPhee to show there was a triable issue of fact as to that issue. In the absence of his own expert declaration, MacPhee failed to satisfy that burden.

The court did not immediately rule on MacPhee's evidentiary objections, and instead stated in its minute order granting the motion that it would take those objections "under submission." Approximately two weeks later, the court issued an order overruling MacPhee's evidentiary objections.

DISCUSSION

1. *Standards Applicable to Summary Judgment*

"A motion for summary judgment should be granted if the submitted papers show that 'there is no triable issue as to any material fact,' and that the moving party is entitled to judgment as a matter of law. [Citation.] A defendant moving for summary judgment meets his burden of showing that a cause of action has no merit if he shows that one or more elements of the cause of action cannot be established, or that there is a complete defense. [Citation.] Once the defendant has met that burden, the burden shifts to the plaintiff to show that a triable issue of material fact exists." (*Myers v. Trendwest Resorts, Inc*. (2007) 148 Cal.App.4th 1403, 1409.)

"There is a genuine issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 845.)

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and

opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor." *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

Moreover, under this de novo standard, "the trial court's stated reasons for granting summary judgment 'are not binding on us because we review its ruling, not its rationale.'" (*Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 157.) We will affirm the summary judgment ruling if it is correct based on any of the grounds asserted in the motion. (*American Meat Institute v. Leeman* (2009) 180 Cal.App.4th 728, 747-748.)

2. *Chanes's Challenge to MacPhee's Claim for Medical Negligence*

MacPhee's sole cause of action against Chanes was based on a theory of medical negligence, or malpractice. "The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Johnson v. Superior Court* (2006) 143 Cal.App.4th 297, 305.)

In his motion for summary judgment, Chanes sought to establish that the undisputed facts demonstrated his treatment of MacPhee had complied with the applicable standard of care, and that MacPhee's complaints about his vision were not caused by any alleged breach of duty. Both of those assertions must typically be proven by expert testimony.

The standard of care element "is the key issue in a malpractice action and can only be proved by expert testimony, unless the circumstances are such that the

required conduct is within the layperson's common knowledge." *Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 (*Lattimore*).)[2] Similarly, the element of causation "'must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case.'" (*Id.* at p. 970.) "In much the same way that laymen are not qualified to judge whether a doctor has been negligent because of their lack of common knowledge on the subject, they also are not qualified from a medical standpoint to determine the effects of the 'negligent' acts of the plaintiff." (*Barton v. Owen* (1977) 71 Cal.App.3d. 484, 506.)

3. *McPhee's Objection to Chanes's Expert Witness Declaration*

MacPhee's primary argument on appeal is that the trial court erred by considering the declaration of Chanes's expert in support of his summary judgment motion. MacPhee contends that "as a matter of law, Chanes's failure to exchange expert witness information causes his experts opinion to be inadmissible" in connection with the summary judgment motion. We disagree.

[2] As explained in *Lattimore*, "This '"common knowledge"' exception is 'principally limited to situations in which the plaintiff can invoke the doctrine of res ipsa loquitur, i.e., when a layperson "is able to say as a matter of common knowledge and observation that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised."' [Citation.] The 'classic example' is an instrument left in a patient's body after surgery." (*Lattimore, supra,* 239 Cal.App.4th at p. 968 fn. 3.)

While MacPhee is correct that Chanes failed to comply with his demand for exchange of expert witness information,[3] he misstates the court's authority in ruling on his resulting objection to the expert testimony. Section 2034.300 provides that "on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has *unreasonably* failed to do any of the following: [¶] (a) List that witness as an expert under Section 2034.260. [¶] (b) Submit an expert witness declaration. [¶] (c) Produce reports and writings of expert witnesses under Section 2034.270. [¶] (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410)." (Italics added.)

We must presume the trial court understood its statutory obligation, and that the court's order overruling MacPhee's objection to Chanes's expert's declaration reflected its determination that when Chanes failed to respond to MacPhee's demand, it did not amount to an unreasonable failure to do any of the things listed in section 2034.300, given the circumstances. We find no error in that ruling.

By the time MacPhee served his demand, Chanes had already identified the expert witness he intended to rely upon in support of his summary judgment motion. Chanes had also disclosed the expert's credentials and the substance of the expert's

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[3] We reject Chanes's contention that MacPhee's demand—and thus his designated date for the exchange of expert witness information—was untimely. Section 2034.230, subdivision (b), requires that the specified date for an exchange shall be either 20 days after service of the demand, or 50 days before the initial trial date, whichever is later. The *initial* trial date set in this case was April 2, 2018, not January 7, 2019, as Chanes seems to believe. The fact that the initial trial date was set while the case was being treated as a limited jurisdiction case makes no difference. Limited jurisdiction cases are subject to the same rules for disclosure of expert witness information. (§ 94, subd. (e).)

The date of MacPhee's demand was January 26, 2018, and his designated exchange date was February 21. Based on the initial trial date of April 8, 2018, both dates were proper.

testimony, both of which are required to be included in the expert witness declaration called for in section 2034.260, subdivision (c). Although those disclosures did not meet all the requirements for the declaration described in the statute, they constituted substantial compliance. And the missing elements of the section 2034.260, subdivisions (c)(4) and (c)(5) declaration—a representation that Chanes's expert would be prepared to sit for a deposition and a specification of his hourly rate for doing so—were unlikely to become material before the summary judgment hearing, since the date that MacPhee had designated for the exchange came after the date his opposition was due. Under those circumstances, the trial court quite reasonably could have concluded Chanes had not unreasonably failed to comply with the requirement that he submit an expert witness declaration.[4] The court was therefore not required to exclude Chanes's expert witness's declaration from the evidence it considered in ruling on Chanes's motion for summary judgment.

We also reject MacPhee's related contention that the court's summary judgment order must be reversed because the court failed to rule on his evidentiary objections until after it had already granted the motion. We agree it was error for the trial court to announce its ruling on the motion before completing its consideration of the losing party's evidentiary objections, but not all errors warrant the reversal of a judgment.

"No judgment shall be set aside, or new trial granted, in any cause, . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause,

[4] The final two justifications for excluding expert witness testimony—that a party unreasonably failed to produce his expert's reports and writings under section 2034.270, or unreasonably failed to make its expert available for deposition, do not seem to be implicated in this case.

including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

Had the court found any of MacPhee's objections to be meritorious, there is a chance that its failure to rule on them earlier might have affected its summary judgment ruling in favor of Chanes. However, because the evidentiary rulings went against MacPhee, there is no basis to conclude that an earlier ruling on those objections might have resulted in a result more favorable to him.

4. *MacPhee's Hearsay Objection to Chanes's Expert Declaration*

MacPhee also contends the court improperly allowed Chanes to rely on his expert's testimony to prove "case-specific" facts in violation of *People v. Sanchez* (2016) 63 Cal.4th 665, 668. In *Sanchez*, the Supreme Court explained that although "[t]he hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise. . . . [¶] . . . an expert has traditionally been precluded from relating *case-specific* facts about which the expert has no independent knowledge." (*Id.* at p. 676.)

This distinction is an important one, and is significant here because Chanes's expert witness claimed no percipient knowledge of MacPhee's condition or of the facts surrounding his cataract surgery. Thus, the expert's declaration, standing alone, would not have been a sufficient evidentiary basis to establish the facts relevant to Chanes's treatment of MacPhee. (See *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 737-738 [explaining that the expert's testimony in that case was insufficient to support summary judgment because "[t]he expert was not a percipient witness to and could not testify about what happened during the surgery"].)

However, while the expert here did review MacPhee's medical records as a basis for forming his understanding of what occurred in this case, the expert's opinion

was not the only evidence relied upon by Chanes to prove those case-specific facts. Rather, the medical records themselves were also admitted into evidence for the court's consideration.

On appeal, MacPhee does not challenge the admission of those records. Consequently, the facts relied upon by the expert were in evidence in connection with the summary judgment, and they could be relied upon as evidentiary support for the expert's opinion. (See *Garibay v. Hemmat, supra*, 161 Cal.App.4th at p. 738 [noting that "[a] proper method for producing these facts [relied upon by the medical expert] would have been . . . properly authenticated medical records placed before the trial court under the business records exception to the hearsay rule"].)

In any event, MacPhee points to only one example of what he contends is the expert's improper assertion of hearsay evidence as fact. He claims the expert improperly concluded that he suffers from keratoconus, which MacPhee denies.[5] The issue of whether MacPhee suffers from keratoconus is significant only concerning the expert's opinion that MacPhee's post-surgical vision problems would not have been caused by the cataract surgery. Specifically, the expert stated "It is my opinion to a reasonable medical probability that the complaints being made by [MacPhee] are due to his pre-existing eye conditions including astigmatism, keratoconus, and corneal scarring from previous surgery."

Because the issue of whether MacPhee suffers from keratoconus was not implicated in the expert's opinion that Chanes had complied with the standard of care in his treatment of MacPhee—the opinion on which the court based its grant of the

[5] The expert explained that keratoconus is "a degenerative condition of the cornea," and our review of the medical records reflects that MacPhee has been assessed as suffering from the condition in his right eye, although not in his left.

summary judgment—the existence of a triable issue of fact on that point would not affect the outcome of the motion.

5. *Chanes's Alleged Failure to Dispose of All Theories of Liability*

MacPhee next contends that even if the trial court properly overruled his objections to the declaration of Chanes's expert witness, the motion for summary judgment should nonetheless have been denied because the moving papers failed to negate both theories of liability set forth in his complaint. Again, we must disagree.

MacPhee construes his complaint as setting forth two distinct theories of liability—one for the damages he attributes to Chanes's failure to select the proper strength of lens to implant, and the other for the double vision he attributes to Chanes's failure to properly perform the surgery. MacPhee contends that although the motion addresses the lens selection issue, it does not address his separate claim that Chanes caused his double vision.

But both of those claims rely on the same theory of liability, i.e., medical negligence, which is the sole cause of action MacPhee pleaded. And while they might be characterized as describing two separate acts of medical negligence, both alleged acts were explicitly addressed within Chanes's expert's declaration opining that the treatment of MacPhee had complied with the applicable standard of care. Specifically, the expert declared not only that Chanes "selected the appropriate lens power based on the preoperative calculations and evaluation," but also that Chanes "performed the left eye cataract surgery within the standard of care."

Those expert opinions, which served to negate an essential element of MacPhee's cause of action—i.e., that Chanes's treatment of MacPhee had breached the applicable standard of care—were sufficient to carry Chanes's initial burden of proving an entitlement to summary judgment. The burden then shifted to MacPhee to show that a

triable issue of material fact existed as to Chanes's compliance with the applicable standard of care.

6. *Alleged Triable Issues of Fact*

Although MacPhee did not submit his own expert testimony to dispute the opinion offered by Chanes's expert, he argues that certain facts set forth in the expert's declaration, as well as other evidence contained in the record, demonstrate triable issues of fact regarding Chanes's adherence to the standard of care.

First, MacPhee points to the expert's acknowledgment that in the wake of MacPhee's cataract surgery, Chanes himself recommended replacing the IOL he had implanted as a means of addressing MacPhee's post-surgical vision issues. MacPhee contends the court could infer from that evidence that Chanes recognized he had selected an improper lens for the initial surgery and that he was therefore negligent. We cannot agree.

The evidence suggests only that Chanes recognized that the lens he initially used had not produced an optimal result and that the result might be improved through the implantation of a different lens. Such evidence does not give rise to an inference of negligence. (*Salgo v. Leland Stanford etc. Bd. Trustees* (1957) 154 Cal.App.2d 560, 570 ["'The mere fact in itself that an unfavorable result is somewhat rare does not give rise to' the inference of negligence"].) Doctors are not guarantors of optimal results, and medical procedures sometimes have poor outcomes even under the best of circumstances.[6]

[6] We note MacPhee contends that Chanes told him prior to surgery that he could "practically guarantee you near perfect 20/20 vision" after the surgery." However, even if that were true, it is irrelevant to a claim for liability based on a theory of medical negligence. Moreover, the record demonstrates MacPhee signed a pre-surgical consent form acknowledging that "[t]he results of surgery cannot be guaranteed."

MacPhee points to other evidence he contends creates a triable issue of fact on the question of whether Chanes actually conducted the appropriate pre-surgical testing to determine the proper lens to implant during his surgery—and which he believes undermines Chanes's expert's opinion regarding his compliance with the standard of care. But this evidence is insufficient to create a contested issue of fact. MacPhee asserted only that two separate efforts to obtain unspecified measurements of his eyes in the period leading up to his surgery "were not successful," while also acknowledging that he was told before the surgery by both an unnamed woman and Chanes that they had gotten the numbers they needed.

Even assuming it were true that some of the efforts to obtain pre-surgical measurements of MacPhee's eyes had not been successful, it would not demonstrate that insufficient pre-surgical testing was conducted. In the absence of additional expert testimony explaining why the medical records in evidence, including the "IOL Calc Report" produced on December 28, 2015 (the day before MacPhee's surgery), do not reflect the completion of sufficient pre-operative testing, we must accept Chanes's expert's contrary unrebutted opinion.

Finally, MacPhee claims that Chanes admitted that in the wake of his surgery, MacPhee suffered from a "'subconjunctival hemorrhage' which is blood covering the white part of an eye," and also admitted that the hemorrhage might have been caused by his "appl[ying] a clamp too tight . . . ." Even assuming that is true, there is no evidence that uneven clamp pressure necessarily reflects a breach in the standard of care—nor is there any evidence that the hemorrhage itself might have been related to the double-vision or other vision problems MacPhee experienced. To the contrary, Chanes's expert acknowledged that the hemorrhage had occurred, but characterized it as a "known" and "benign" complication of cataract surgery, and concluded that notwithstanding the hemorrhage, Chanes had performed the surgery within the standard of care. That conclusion stands unrebutted.

DISPOSITION

The judgement is affirmed. Respondents are to recover their costs on appeal.

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.